IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a corporation, and PORTNEUF-MARSH VALLEY CANAL COMPANY, a corporation,

Petitioners,

vs.

HOWARD W. BROWN and JOHN R. CHAPIN, as Trustees,

Respondents.

To the Circuit Court of Appeals of the United States, for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

D. C. McDOUGALL,
I. E. McDOUGALL,
H. O. McDOUGALL,
J. H. PETERSON,
T. C. COFFIN,

Residence and Post Office Address:
Counsel for Petitioner,
Pocatello, Idaho.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Portneuf Marsh Valley Canal Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, respectfully presents to this court its Petition for a Writ of Certiorari addressed to the Circuit Court of Appeals of the United States, for the Ninth Circuit, commanding said Court and the clerk thereof, to certify to this Court the record and proceedings of the case in said Court, wherein your petitioner was appellee and the respondents, Howard W. Brown and John R. Chapin, as Trustees, were appellants, together with its opinion therein for the review and determination of said cause by this Court.

The reasons relied on for the issuance of said Writ and upon which your petitioner believes that a Writ ought to be issued, and which will be more fully stated hereafter, may be summarized as follows:

FIRST: The Circuit Court of Appeals of the United States for the Ninth Circuit has rendered a decision in this cause, touching an important question of local law in a way probably in conflict with applicable local decisions in this: The Circuit Court of Appeals of the United States for the Ninth Circuit has construed Section 3019 of the Idaho Compiled Statutes in a manner which is probably in conflict with the decision of the Supreme Court of the State of Idaho in the case of Continental & Commer-

cial Trust & Savings Bank v. Werner, 36 Idaho, 602; 215 Pac., 458.

SECOND: The Circuit Court of Appeals of the United States for the Ninth Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority in this: That the said Circuit Court of Appeals of the Ninth Circuit has held that a stockholder in a corporation can create a lien upon stock issued to him, superior to the lien of the assessments made on said stock by the corporation.

THIRD: In the interest of uniformity of decision in the Circuit Court of Appeals of the United States for the Ninth Circuit, in this: That in the cause here involved, the Circuit Court of Appeals of the United States for the Ninth Circuit has held, in effect, or has been aided in reaching its decision which is reported under the title of Brown, et al., v. Portneuf-Marsh Valley Irrigation Company, et al., 5 Fed. (2nd,) 895, that a lien is created by the so-called Carey Act, (Act of Congress, approved August 18th, 1894) and amendments thereof, and has held to the contrary, in effect, in a case in which the decision was rendered upon the same day, namely, Equitable Trust Company of New York, et al., v. Cassia County, et al., reported in 5 Fed. (2nd,) 853, which latter decision is in conformity with the decisions of the Supreme Court of the State of Idaho, the latest of which is Continental & Commercial Trust & Savings Bank v. Werner, et al., 36 Idaho, 602; 215 Pac., 458.

FOURTH: The Circuit Court of Appeals of the

United States for the Ninth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this court, namely, the effect of the so-called Carey Act upon liens sought to be imposed under the state laws of the various states on properties included within Carey Act irrigation projects.

In this behalf, your petitioner states the following facts:

The controversy here grows out of a so-called Carey Act Irrigation project in Bannock County, Idaho. The primary question presented for decision is whether or not assessments levied by a Carey Act operating company for the necessary expense of maintaining and operating the irrigation system, upon stock issued pursuant to contracts of sale to settlers purchasing water rights, are valid as against and superior to the claim of the construction company and its assignees for deferred, unpaid installments on account of the purchase of water rights.

The project involved in this case consists of a reservoir on the headwaters of Portneuf River in Idaho and a system of canals for the diversion and distribution of the stored waters and natural flow of Portneuf River for the irrigation of a body of approximately fourteen thousand acres of land in Bannock County.

The project, in its history, is similar in all substantial respects to all Carey Act improvement projects. The promoters of the project initiated the same by obtaining from the State of Idaho a permit

to appropriate, store and sell certain waters of the Portneuf River shed. Thereupon, the State of Idaho, in the usual manner, made application to the Secretary of the Interior for the withdrawal from entry of public lands embraced within the proposed project; the State of Idaho contracted with the Secretary of the Interior for reclamation under the Carey Act of the lands thus withdrawn; the promoters of the project then organized the corporation which was to construct the project and which, in this instance, is the Portneuf Marsh Valley Irrigation Company. The water permits and rights acquired by the original promoters were then transferred to the construction company aforesaid. Thereupon, this construction company entered into a contract with the State of Idaho for the building of the irrigation works and storage works and obtained from the State of Idaho the exclusive privilege of selling water rights out of said system to settlers on the land involved, at stipulated prices.

For the purpose of obtaining funds to construct the system, the construction corporation executed a Trust Deed upon all its property and rights then owned or thereafter to be acquired, to secure an issue of bonds. By the sale of these bonds, money was to be procured to construct the system.

The land in the segregated areas was sold to settlers at the nominal price provided by the Carey Act, together with water rights in the irrigation system, for the irrigation of the land. The sales were made by contract, requiring a small cash payment down and the balance in deferred installments, the deferred installments being secured by a lien on the water right and the settler's land entry.

Th construction company pledged these contracts which it had with the settlers, with the trustees under the Trust Deed, to further secure he bond issue.

In the contract for the reclamation of the land which the construction company made with the State of Idaho, which is a part of the usual machinery for the building of such projects, it was provided that the construction company should cause to be formed an operating company. The operating company was to be a corporate organization, formed for the sole purpose of owning and managing the system and delivering water to the various settlers thereunder. Ultimately, all stock in the operating company was to be held by the settlers themselves. When contracts for the sale of water to settlers were made by the construction company, stock was to be issued to all settlers so contracting for water on the basis of one share for each acre of land owned by the settler and irrigated from the system, which share of stock would represent a proportionate interest in the entire irrigation system, including all water rights, reservoirs and canals. Stock in the operating company was to be delivered to the settlers at the time they made their contracts with the construction company and made their first payment, but was to be immediately assigned by the respective settlers to the construction company, and such stock was, by the construction company, pledged as additional security with the trustees under the Trust Deed. In this case, the operating company is the petitioner here, namely, the Portneuf Marsh Valley Canal Company.

The Portneuf Marsh Valley Irrigation Company,

the construction company, was organized with a capital stock of $500,000.00, consisting of five thousand shares of a par value of $100.00 per share. This construction company entered into a contract with the State of Idaho for the construction of the system, wherein the cost of the construction was estimated at $275,000.00. The system was to supply water for the irrigation of approximately twenty thousand acres of land and the construction company was authorized to sell water rights at a rate of $35.00 per acre for most of the land and $25.00 per acre for the balance. If an average of $30.00 per acre be assumed, the total possible return to the construction company from the sale of water rights alone would be $600,000.00 as against an estimated cost of $275,000.00 only.

The respondents here, who were the plaintiffs in the District Court for the District of Idaho, where the cause originated, are the successors in trust of the trustees named in the Trust Deed covering the system, which was executed by the construction company in October, 1909, to secure the payment of a contemplated bond issue of $300,000.00. The contract between the construction company and the State of Idaho for the construction of the system is dated June 3, 1908, and the contract between the State of Idaho and the United States, under the Carey Act is dated May 14th, 1908. At the time the Trust Deed was executed many water rights in the system had already been sold to settlers, and all of the water rights involved in this action were sold prior to the execution and delivery of the Trust Deed, and the contracts of the settlers with the construction company were recorded prior to that time.

In the course of the trial in the District Court in Idaho, the plaintiffs, who are respondents here, conceded that, in so far as the issue to be there decided was concerned, they, the plaintiffs, stood in the shoes of the construction company and had no greater rights than the construction company itself would have had. In the brief of the plaintiffs in the District Court, which is referred to in the Memorandum Decision of the Honorable F. S. Dietrich, District Judge, it was stated:

> "The only controverted issue presented for decision in this case is the relative priority of the lien of the Portneuf Marsh Valley Irrigation Company Limited (this company, we have heretofore in this statement designated as the construction company) for the purchase price of its water rights as against the lien of the Portneuf Marsh Valley Canal Company, a Carey Act settlers' operating company, by reason of assessments for maintenance."

In Article One of the Trust Deed, for the foreclosure of which the plaintiffs instituted this action, there is an express provision to the effect that, so long as the construction company is not in default, it:

> *"May sell and may exchange for other property, free of the lien hereof, water and water rights to bona fide purchasers thereof and receive and collect the proceeds of such sales and trades precisely as if this mortgage had not been made."*

There is no allegation in the pleadings and no proof in the record of any existing defaults when any of the water rights involved in this action were sold. The trustees, who are the respondents here,

hold in pledge for the payment of bonds, numerous settlers' contracts for the purchase of water rights, upon which deferred installments of the purchase price are still due. This is in accordance with the provisions of the Trust Deed, requiring that at all times the trustees must have in their possession such contracts or other securities to the amount, in face value, of one hundred fifty per cent of the outstanding bonds. In this action the respondents, as trustees, have sought to foreclose the Trust Deed for default in the payment of the bonds and no question is made by either of the defendants of the right to foreclose for the total amount remaining due upon the bonds.

One of the defendants, the construction company, namely, the Portneuf Marsh Valley Irrigation Company, by which the Trust Deed and the bonds were executed, is insolvent and makes no defense. The other defendant is the Portneuf Marsh Valley Canal Company, which in Carey Act practice, under the laws of Idaho, is known as the operating company. This corporation is provided for in the contract between the construction company and the State of Idaho and reference to it is made in the Trust Deed, it being intended as a convenient entity by which the legal title to the irrigation system is permanently held and by which it is maintained and operated. Its capital stock consists of a number of shares equal to the number of acres to be irrigated, the shares being of the nominal value of $1.00 each. Instead of deeding to each purchaser or settler a water right to the amount of water that he actually purchases, the construction company deeded the entire system to the operating company and the operating com-

pany then issued its stock to the settlers on the basis of one share for each acre of water right actually purchased. In that way the operating company took over the system and the operating company was managed and controlled by directors, elected as in ordinary corporations. It will be noted that the only property owned by the operating corporation was the irrigation system, from which no revenue whatever was derived, and the only means of caring for the expense of maintaining and operating the system was by assessments against water users in the system, which, in this instance, was by assessments upon stockholders in the operating company.

In conformity with the general practice in cases such as this, and pursuant to the express provision of its contract with the State of Idaho, the construction company organized the operating company, the petitioner here, with a capital stock of twenty thousand shares. One step in the organization of the operating company was the preparation and acceptance of an elaborate set of by-laws. The irrigation system was, by the construction company here, deeded to the operating company, with certain stipulations agreed to by both companies. The stock of the operating company was issued to the several holders of water contracts in proportion to their holdings, subject to a lien for the unpaid purchase price as provided by the State of Idaho contract and the settlers' contracts, and the balance of stock which the construction company had not sold was held by it. By a subsequent agreement with the settlers, this stock held by the construction company

until sold to settlers, was not chargeable with the burdens of maintenance and operation.

While, originally, the irrigation of twenty thousand acres was contemplated, the plan was later modified and the acreage cut to fourteen thousand acres. Of this area, the promoting or construction company succeeded in selling rights for only twelve thousand two hundred forty acres. Of the fourteen thousand shares of stock in the operating company, authorized to be issued, the construction company continued to hold, and now holds one thousand, seven hundred sixty shares, which represent a proportionate interest in the irrigation system. As to these shares and the beneficial interest in the system which they represent, there is no controversy, and the petitioner here concedes that by foreclosure and sale, the purchaser will succeed to and will acquire the interest of the construction company. On the other hand, the respondents here, who were plaintiffs in the original action, concede that by foreclosure and sale, neither they nor the purchaser will acquire anything in respect to shares of stock held by settlers who have fully paid for their water rights, or in respect to the beneficial interest in the system represented by such stock. The concession of the plaintiffs goes also to stock held by settlers for water rights not fully paid for, but in respect to which there is no default, and concerning this stock, it is not disputed that the plaintiffs will get nothing other than rights possessed by the construction company and its assignees, namely, to receive installments as they become due and are paid.

Upon taking over the irrigation system, the oper-

ating company, the petitioner here, was under obligation to maintain and operate. To meet the expense of such operation it, from time to time as there was need, levied assessments upon the stock issued to settlers, all pursuant to the provisions of the contract with the State of Idaho, the settlers' contracts and the by-laws, all of which were prepared by and, in effect, adopted by the construction company. Upon default in the payment of the assessments thus levied by the operating company, the delinquency of the particular stockholders or settlers was advertised and the stock of these settlers was offered for sale, pursuant to notice. There being no other bidders, the operating company purchased the delinquent stock for the amount of the assessment, plus interest and penalties. A by-law of the operating company, or a resolution of the Board of Directors, provided that stock so purchased by the operating company should be held by the company with the privilege to the original holder, or his assigns, to redeem it by paying the amount for which it was sold, together with interest and all subsequent assessments and interest thereon. This stock, aggregating 5495.2 shares, the petitioner (the operating company) now claims to own, together with the proportionate beneficial interest represented by them in the system, subject, however, to the privilege of redemption just explained. In all such cases, the settlers also defaulted in the payment of the installments due upon their water contracts with the construction company, which contracts were held in pledge by the plaintiffs, who are respondents here, as trustees. In some instances the trustees foreclosed the lien provided for in these contracts upon the land and water stock and became the purchaser

of both the land and water right represented by the stock, and in other cases, for a small consideration, they acquired the land and water right by deed directly from the settler, without suit. The respondents here, who were plaintiffs below, as trustees under the Trust Deed, assert that their rights to the stock here involved, namely, 5495.2 shares, are paramount to the rights of the operating company which purchased the stock on account of delinquent assessments for maintenance. The operating company which is the petitioner here, asserts that by purchasing the shares of stock at sales held because of the non-payment of assessments levied as heretofore explained, it acquired the paramount right to the stock, free of all liens and subject only to the privilege of the original holder of the stock, or his assigns, which in this instance would be the trustees, to redeem the stock by paying the amount for which the stock was sold, together with interest and all subsequent assessments and interest thereon. These two claims present the issue which your petitioner asserts was erroneously decided by the Circuit Court of Appeals for the Ninth Circuit. The issue is thus stated by counsel for respondents and referred to by the learned trial judge, the Honorable F. S. Dietrich:

> "The only controverted issue presented for decision in this case is the relative priority of the lien of the Portneuf Marsh Valley Irrigation Company Limited (the construction company) for the purchase price of its water rights as against the lien of the Portneuf Marsh Valley Canal Company, a Carey Act settlers' operating company, by reason of assessments for maintenance."

This issue presents itself without dispute for the

reason that all parties to the cause have agreed that the respondents here, as plaintiffs, stand in the shoes of the construction company and have no greater rights.

The Articles of Incorporation of the Portneuf Marsh Valley Canal Company, which company was organized by the Portneuf Marsh Valley Irrigation Company, the construction company, to take over the ownership and operation of the irrigation system, provide that this operating company shall have the power to operate and maintain said irrigation system and works as the same shall be completed and turned over to it during the period of construction and subsequent thereto, and to levy and collect tolls, charges and assessments for the carrying on and maintaining of said irrigation system and management and operation thereof. This company was formed prior to the time that any of the contracts with settlers, affected by this action, were entered into.

The by-laws of the Portneuf Marsh Valley Canal Company, the adoption of which by the company, under the Idaho laws, was a prerequisite to its organization and which likewise were adopted prior to the making of any contracts with settlers whose stock is involved in this action, provide that, for the purpose of defraying expenses of the company of whatsoever kind, and paying the cost of maintaining, managing and operating said canal system, the Board of Directors of the company are authorized and directed to levy such tax or taxes, charge or charges, assessment or assessments, as in the judgment of the board may appear necessary or proper

to raise the money or revenue required. They further provide that all such expenses, taxes, costs and charges shall be apportioned among all the stock issued by the company, which has been applied and made appurtenant to land, but no such assessment or tax shall be levied against shares which have been issued to or are held for the benefit or in the interest of the Portneuf Marsh Valley Irrigation Company Limited and which has not been sold or made appurtenant to land. The taxes or assessments so provided for shall be levied against the owners of the shares of stock applied or made appurtenant to land, regardless of whether water has been used for irrigation purposes by the holder of said stock. The by-laws in the following section provide that in addition to the method just mentioned for the raising of the revenue and money, the directors may levy assessments upon the stock of the corporation as provided by the laws of the State of Idaho for the levying of assessments upon corporate stock.

The contracts for the purchase of water between the construction company and the settlers provided, among other things, that the construction company would cause to be formed the said operating company and that the operating company was to have power to levy all taxes, tolls, charges and assessments upon all users of water *in proportion to the respective holdings of stock, whether water was used or not*, and further provided on behalf of the purchaser that he, the said purchaser would pay such charges in advance at the office of the said operating company on the first day of April of each year, without notice.

In the course of the trial, counsel for the trustees, the plaintiffs herein, made the following statement with respect to the assessments levied and at issue here:

> "I think it may be admitted that the assessments as levied were not excessive but reasonably necessary in the operation and maintenance and improvement of the canal system, and further that the money so raised was used for the reasonable and necessary expenses of the company in the operation and management of the irrigation ditch."

The plaintiffs in the trial, assuming as they did the priority of the liens which they sought to foreclose, conceded through their counsel:

> "That neither the plaintiffs, nor anybody in their behalf, have ever tendered any payment on the amount of assessment."

Your petitioner is advised that the decision of the United States Circuit Court of Appeals for the Ninth Circuit is final and is erroneous, and that the same is not reviewable by a writ of error, and this Honorable Court should require the case to be certified to it for its review and determination.

Your petitioner, in the brief accompanying this petition, will more particularly elaborate upon the foregoing questions.

Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit, and the opinion of the said court.

WHEREFORE, Your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, commanding the said court to certify to and send to this court, on day to be designated, a full and complete transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Ninth Circuit had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Circuit Court of Appeals of the United States for the Ninth Circuit, be reversed by this Honorable Court, and for such other and further relief as may seem proper, and your petitioner will ever pray.

Your petitioner respectfully submits the following brief in amplification of its petition:

The apparent complications in the situation presented by the Petition for the Writ are susceptible of being resolved into a single clear-cut issue. That issue is the priority of what may be termed a construction lien and a maintenance lien. Both liens, necessarily, result from the method provided for the reclamation of arid lands under the Carey Act, and if we can define the two liens, we can then hope to be able to state the issue with sufficient clarity to make possible its easy solution.

To determine the nature of the two liens, we must have recourse to the legislation upon the subject. With respect to the lien claimed by the respondents here, who as trustees under the trust deed, sought

to foreclose a mortgage in the lower court, we submit the following as justified hypotheses:

FIRST: The Carey Act (Act of Congress approved August 18th, 1894, 28 Statutes at Large, 372,422, and amendments thereto) is an enabling act conferring upon the states availing themselves of its terms the authority to create liens, upon land reclaimed, for the actual cost of reclamation. It does, not, itself, create any lien, and by its terms, as we read it, specifically disclaims the intention to create any liens. Continental & Commercial Trust & Savings Bank v. Werner, 36 Idaho, 602; 215 Pac., 459. Equitable Trust Company of New York v. Cassia County, 5 Fed. (2nd) 955.

SECOND: Section 3019 of the Idaho Compiled Statutes creates a lien in favor of the person, company or association contracting with the state for the reclamation of such lands. As we shall hereafter demonstrate, this section refers to the lien which the trustees, under the bond issue here, have sought to enforce, but it does not affect the lien which the petitioner here asserts is the paramount lien. That section provides as follows:

> Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and

satisfied according to the terms of the contract under which said water right was required.

THIRD: The contract between the State of Idaho and the construction company, the Portneuf-Marsh Valley Irrigation Company, entered into on June 3, 1908, provided, among other things, that the construction company should sell or cause to be sold to the person or persons filing upon any of the lands in said contract described, or to the owners of other lands not therein described but which were susceptible of irrigation from the proposed canal system, by good and sufficient contract of sale, with right of possession and enjoyment by the purchaser pending its fulfillment, a water right or share in said canal for each and every acre filed upon or purchased from the state or acquired from the United States. The contract provided that these water righs should be sold a a price not to exceed $35.00 per share, to be payable $3.00 per share down and the remainder in nine equal annual installments, bearing interest at the rate of six per cent per annum. The contract between the state and the construction company also provided that, because of the necessity of transferring the ownership and control of the canal and irrigation works from the construction company to the purchasers of water rights, and because of the necessity of operating and maintaining said canal during the period of construction and afterwards, and because of the necessity of levying and collecting tolls, charges and assessments for the management and operation of the said canal, an operating company should be formed. Stock in the operating company should be issued to purchasers of water at the time they purchased the water, at the ratio of one share

of stock for each acre of water right purchased, which stock should be by the construction company delivered to the purchaser and by the purchaser assigned to the construction company to be held by it until thirty-five per cent of the purchase price of the stock had been paid.

The contract with the State of Idaho further permitted the construction company to mortgage the irrigation system and the lands, to secure funds to construct the same.

FOURTH: The contract made and entered into between the construction company and the purchasers of water rights, among other things, provided that the construction company would cause to be formed an operating company and that the operating company was to have power to levy all taxes, tolls, charges and assessments as might be necessary to operate and maintain the system, upon all users of water in proportion to their respective holdings of stock, whether water was used or not.

FIFTH: The Articles of Incorporation of the operating company, the petitioner here, provided that the operating company should have the power to operate and maintain the irrigation system and works and to levy and collect tolls, charges and assessments for the maintenance and operation thereof.

SIXTH: The by-laws of the operating company provided that, for the purpose of defraying expenses of the company of whatsoever kind, and of paying the cost of maintenance, management and operation

of the canal system, the board of directors of the company were authorized to levy such tax or taxes, charge or charges, assessment or assessments, as in the judgment of the board might be necessary, but that no charge or assessment of any kind should be levied against shares of stock which had been issued to, or were held for the benefit of, or in the interest of the Portneuf-Marsh Valley Irrigation Company, and which had not been sold or made appurtenant to land. These by-laws also empowered the directors to raise the necessary revenue by levying upon the outstanding stock which had been made appurtenant to land, in the same manner that assessments are levied upon the stock of other corporations in Idaho.

SEVENTH: The trust deed, under which the respondent trustees here claim, in its first Article provided that so long as the construction company was not in default it might sell and might exchange for other property, free of the lien of the trust deed, water and water rights to bona fide purchasers thereof and receive and collect the proceeds of such sales and trades precisely as if the mortgage had not been made.

It is material here to direct attention to the fact that the trust deed was executed and delivered subsequent to all of the other matters just mentioned. With respect to all the other matters just mentioned, the record had been made and notice thereof must be presumed to all interested parties at the time the trust deed was made and executed. It is also of material importance to note that with respect to all the water rights involved in this action, there is in the record neither allegation nor proof of any default on the part of the construction company prior to the time that the water rights were sold.

The water rights here involved represented by 5495.2 shares of stock in the Portneuf-Marsh Valley Canal Company are asserted by the respondent trustees to be held by them as a pledge, free and clear of all liens, for maintenance and operation of the canal system during the time they were held in pledge and subject to the payment, prior to all other liens, of the amount remaining due on the water contracts of the settlers to whom the stock was issued.

We submit it as a proposition which is self-evident that a stockholder in a corporation cannot assign his stock so as to free it from the obligation of paying all assessments lawfully levied against it by the corporation. Unless we are incorrect in the foregoing premise, there remain but two theories upon which the trustees here could assert a priority of lien upon the stock for the unpaid balance on the settlers' contracts: *First*, that the Carey Act, in and of itself, created some lien; and *second*, that Section 3019 of the Idaho Compiled Statutes of the State of Idaho created the lien.

As to the first theory, we submit the decision of the Circuit Court of Appeals of the Ninth Circuit in the case of Equitable Trust Company v. Cassia County, *supra*. If the Circuit Court of Appeals for the Ninth Circuit is correct in the Equitable Trust Company case, then no lien can be asserted under the Carey Act.

As to the second of the above theories, the Supreme Court of the State of Idaho has construed Section 3019 in the case of Continental & Commercial Trust & Savings Bank v. Werner, 36 Idaho, 602; 215 Pac., 459, and by analogy has held that the lien here asserted by the petitioners is not affected by that section. In this respect we submit also the decision of the Honorable F. S. Dietrich, District Judge, in the instant case, his decision appearing in the record at Pages 424 to 449

Whether the petitioner is correct or incorrect in the position necessarily assumed in presenting its Petition for a Writ of Certiorari, the following matters would seem to call for the exercise of the supervisory powers of this Court: First: There is an apparent direct conflict in the decisions of the Circuit Court of Appeals for the Ninth Circuit in the two cases of Brown, et al., v. Portneuf-Marsh Valley Irrigation Company, 5 Fed. (2nd) 896, and Equitable Trust Company v. Cassia County, 5 Fed. (2nd) 955, the original opinions in both of which were handed down on May 25, 1925. Second: There is an apparent direct conflict between the Circuit Court of Appeals of the Ninth Circuit in its decision in this case and the Supreme Court of the State of Idaho in its decision in the case of Continental & Commer-

cial Trust & Savings Bank v. Werner, 36 Idaho, 602; 215 Pac., 459, with respect to the interpretation of the Compiled Statutes, Section 3019, of the State of Idaho.

It is respectfully submitted that the Writ should issue.

D. C. McDOUGALL.

T. E. McDOUGALL.

H. O. McDOUGALL.

J. H. PETERSON.

T. C. COFFIN.

Counsel for Petitioner,
Residence and Post Office Address,
Pocatello, Idaho.

STATE OF IDAHO, } ss.
County of Bannock. }

D. C. McDougall, J. H. Peterson and T. C. Coffin, being first severally sworn upon oath, depose and say, each for himself and not one for the other:

That he is one of counsel for the petitioner, Portneuf-Marsh Valley Canal Company; That he has read the above and foregoing annexed Petition and knows well the contents thereof; That he has also carefully read and studied a certified copy of the Transcript of the Record which accompanies the Petition herein, being the Transcript of the Record in the case at bar; That the matters in said Petition are, in the judgment of this affiant, duly supported

in and by said Transcript of the Record, and that he knows of the above proceedings had and that the facts in said Petition herein stated are true to the best of his knowledge and belief.

D. C. McDOUGALL.

J. H. PETERSON

T. C. COFFIN

Subscribed and sworn to before me this 4th day of December, 1925.

E. REBECCA HAYS

(Notarial Seal) Notary Public.
Residence: Pocatello, Idaho.
My Commission expires October 30th, 1927.

We do hereby certify that we have carefully examined the foregoing Petition for a Writ of Certiorari and that the allegations thereof are true, as we verily believe, and in our opinion, the Petition is well founded and the case is one in which the prayer of the Petition should be granted by this Court.

D. C. McDOUGALL

J. H. PETERSON

T. C. COFFIN

Counsel for Petitioner,
Residence and Post Office Address,
Pocatello, Idaho.